

Doc # 4680

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MEMORANDUM

NOVEMBER 21, 1985

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: PAUL L. McCANN, EXECUTIVE ASSISTANT TO THE DIRECTOR
SUSAN ALLEN, ASSISTANT DIRECTOR FOR URBAN DESIGN AND
DEVELOPMENT

SUBJECT: WATERFRONT PROJECT, MASS. R-77, CERTIFICATE OF GROUND
LESSOR RE MARKETPLACE CENTER, NECESSARY TO FACILITATE
THE PERMANENT FINANCING CLOSING WITH AETNA CASUALTY

The Authority as Landlord and Marketplace Center Limited Partnership as Tenant, entered into an eighty (80) year Ground Lease dated September 29, 1983 of Parcel D-10 under which the Tenant is to construct an office and retail complex in accordance with plans approved by the Authority. Fixed rent has been paid under the Lease since its execution at rate of \$116,667 per month, and percentage rent will be payable based on fifteen (15%) percent of net cash flow.

Since entering into the Ground Lease, Marketplace Center Limited Partnership has been engaged in the construction of the Project with construction financing being provided by Citicorp Real Estate, Inc. The Project has proceeded to substantial completion of the shell building. Twelve retail leases have been signed and two retail tenants are already in occupancy with several more expected to be opened for business in time for the holiday selling season. Office leases have been signed covering the top four floors of the office tower and negotiations are actively underway with several other prospective office tenants. The Aetna Casualty and Surety Company and Aetna Casualty & Surety Company of Illinois have committed to provide permanent financing for the Project in the maximum amount of \$74,000,000 with an initial disbursement for shell building construction of \$66,600,000 with future disbursements as tenant's space is completed and rental levels achieved. Provisions are made for escrow of one hundred twenty five (125%) percent of the costs to fully complete construction of the building shell and further escrows for tenant improvement work and the cost to carry the Project through the initial leasing period until the Project reaches the break even point.

Under a Letter Agreement dated September 20, 1985, Marketplace Center Limited Partnership has agreed that the

Authority shall receive fifteen (15%) percent of the net refinancing proceeds realized through the Aetna financing, and that an initial payment of \$225,000 on account of the Authority's share of net refinancing proceeds is to be made at the initial closing of the Aetna financing.

As a precondition of initial funding of its loan, Aetna requires confirmation from the Authority that construction of the building shell has been substantially completed as contemplated by the Ground Lease; that the Ground Lease is not in default; that Aetna's proposed financing complies with the requirements of the Ground Lease and that Aetna will be a Qualifying Leasehold Mortgagee under the Ground Lease; and clarification of the meaning of certain provisions of the Ground Lease as they apply to the Aetna financing. Aetna has requested that the "Certificate and Agreement of Ground Lease" attached to the Resolution which accompanies this Memorandum be executed by the Authority to accomplish those purposes.

Since the improvements have been substantially completed in accordance with plans approved by the Authority, and the Aetna financing requires the establishment of an adequate escrow for full completion, and since the Authority will receive fifteen (15%) percent of the net refinancing proceeds generated by the Aetna financing with an initial payment of \$225,000 at the closing, it is recommended that the Authority provide Aetna with the assurances and agreements it has requested.

VOTED: That the Director be, and hereby is, authorized to execute a Certificate of Ground Lessor regarding Marketplace Center, substantially in accordance with the form attached hereto, in order to facilitate the permanent financing closing with Aetna Casualty and the resulting payment to the Authority of an initial \$225,000 in refinancing proceeds; such agreement to include such other terms and conditions as the Director deems necessary and in the best interests of the Authority.

CERTIFICATE AND AGREEMENT OF GROUND LESSOR

This Certificate and Agreement of Ground Lessor ("Agreement") is made as of the day of November, 1985, by and between the BOSTON REDEVELOPMENT AUTHORITY ("Landlord"), a public body politic and corporate organized under the laws of The Commonwealth of Massachusetts for the benefit of The Aetna Casualty and Surety Company and affiliated companies and Aetna Casualty & Surety Company of Illinois (collectively "Aetna") and Citicorp Real Estate, Inc. ("Citicorp").

Reference is made to a certain Ground Lease (the "Lease") by and between Landlord and Marketplace Center Limited Partnership ("Tenant"), a Massachusetts limited partnership. Unless otherwise specifically provided, capitalized terms used in this Agreement shall have the same meanings as in the Lease and references to Sections and Articles by number shall be to Sections and Articles of the Lease.

WITNESSETH:

WHEREAS, Aetna is making a loan (the "Loan") to Tenant in the maximum original principal amount of \$74,000,000 secured by certain Mortgage and Security Agreement (the "Aetna Mortgage") by which Tenant has assigned its leasehold estate and its other rights under the Lease to Aetna; and

WHEREAS, in connection with making the Loan, Aetna requires certain confirmations, assurances and agreements by and from Landlord in order to protect its security under the Aetna Mortgage; and

WHEREAS, understanding that Aetna will rely upon the same in making the Loan, Landlord is willing to make such confirmations, assurances and agreements;

WHEREAS, Citicorp is the construction lender for the construction of the Initial Improvements and will subordinate its Leasehold Mortgage to the Aetna Mortgage but will continue to hold a second Leasehold Mortgage to secure Tenant's obligations with respect to a letter of credit issued by Citibank, N.A. (an affiliate of Citicorp) as part of an escrow to assure payment of debt service, ground rent and operating expenses during the lease-up of the Property.

NOW THEREFORE, in consideration of the Property, and for other good and valuable consideration the receipt and sufficiency of which are acknowledged, Landlord hereby agrees as follows for

the benefit of Aetna and with respect to Section 16 below, also for the benefit of Citicorp:

1. The Lease, a true, accurate and complete copy of which is attached hereto as Exhibit A, has not been amended, is in full force and effect as of the date hereof without default on the part of Landlord or Tenant, and together with the letter agreements dated September 29, 1983 and September 20, 1985, included in Exhibit A constitute the entire agreement between Landlord and Tenant with respect to the Property.

2. Landlord acknowledges receipt of notice from Tenant of intent to enter into the Aetna Mortgage and of true copies of the Aetna Mortgage and confirms that subject only to recording of the Aetna Mortgage the same is and shall be deemed effective under, and fully in compliance with, all applicable provisions of the Lease, including Section 19.2(c) and Article 23 thereof, such that the Aetna Mortgage constitutes a Leasehold Mortgage and a First Lien on Tenant's leasehold estate and Aetna enjoys the status of Qualifying Leasehold Mortgagee under the Lease. Landlord agrees that until further notice the name and address for Aetna as Qualifying Leasehold Mortgagee shall be as set forth in the Aetna Mortgage.

3. Regarding the provisions of Section 4.5, Landlord shall cooperate with Tenant and Leasehold Mortgagee to maintain the Leasehold Premises as a separate parcel for all purposes. In the event the same are ever part of a larger parcel, Landlord agrees to take all reasonable steps to prevent the termination of the Lease by reason of any mechanics' or materialmen's liens, any liens for unpaid taxes or any other liens arising with respect to the balance of such parcel not including the Leased Premises.

4. Tenant shall not be deemed to be in violation of its obligation under Section 5.2 to use the Leased Premises and Improvements "continuously and without interruption, subject to vacancies arising in the ordinary course of the operation of the Property" or to have "abandoned" the Leased Premises within the meaning of Section 18.2(e) if Tenant in exercising good faith efforts to lease or otherwise operate the Property in accordance with the Lease, and is pursuing all commercially reasonable efforts to so lease or otherwise operate the Property.

5. Pursuant to Section 7.11 of the Lease, the Landlord does by this instrument certify to Tenant and to Aetna that the Initial Improvements have been substantially completed in accordance with the provisions of the Lease, and this instrument shall constitute a Certificate of Completion within the meaning of said Section 7.11. A portion of the Loan is to be utilized to establish an

escrow account with Aetna on terms satisfactory to the Director of the Boston Redevelopment Authority to assure final completion of the Initial Improvements.

6. For purposes of the proviso at the end of Section 10.6, the Lease shall not be deemed terminated if the Leasehold Mortgagee shall elect to enter into a new lease pursuant to the provisions of Section 23.3(h). Notwithstanding any other contrary provisions of the Lease: (i) if for any reason, other than Leasehold Mortgagee's refusal to make its interest in the Proceeds available as provided in the Lease, the Tenant fails to restore or reconstruct the Improvements and Building Service Equipment as provided in the Lease, and if Aetna forecloses the Aetna Mortgage or elects to enter into a new lease pursuant to Section 23.3(h), Aetna shall not be required to expend more than the Proceeds in such restoration or reconstruction; and (ii) if by reason of inability to obtain permits, or for other reasons beyond the control of Tenant or Leasehold Mortgagee, the Tenant and Leasehold Mortgagee are incapable of restoring and rebuilding the Improvements and Building Service Equipment and therefore the Proceeds cannot be applied for those purposes as provided in the Lease, the proceeds shall be paid first to the Leasehold Mortgagee, up to the total of the principal and other amounts then due under the Leasehold Mortgage, with any balance to be paid to Landlord.

7. There is in effect a Leasing Program for the leasing of space on the first and second floors of the Improvements which Leasing Program has been approved by the Landlord under Section 20.1. A copy of such Said Leasing Program is attached hereto as Exhibit B.

8. For purposes of clarifying and confirming to Aetna the meaning and application of Section 19.2(b)(ii), it is agreed (i) that the Lease does not restrict or limit the giving or assignability of the Aetna Mortgage or the assignability of any other Leasehold Mortgage, and (ii) the Lease does not limit or restrict or require the Landlord's consent to any assignment or transfer of Tenant's rights under the Lease and the leasehold estate from and after a foreclosure or transfer or assignment in lieu of foreclosure of a Leasehold Mortgage, whether or not five years have expired after the issuance of a Certificate of Completion with respect to the Improvements.

9. Notwithstanding any contrary interpretation or application of the provisions of Section 23.4 in connection with and from and after any foreclosure or transfer in lieu of foreclosure of any Leasehold Mortgage, the purchaser at any foreclosure sale shall be permitted a Leasehold Mortgage of an amount at least equal to the amounts unpaid under the Leasehold Mortgage being foreclosed even if the amounts unpaid under such prior Leasehold

Mortgage are then in excess of Total Project Costs and the new Leasehold Mortgage does not satisfy the terms set forth in the second paragraph of Section 23.4.

10. Notwithstanding the provisions of Section 23.3(h), the status of any Leasehold Mortgagee as a Qualified Leasehold Mortgagee shall not be lost if a Qualifying Leasehold Mortgagee assigns its Leasehold Mortgage or moves or changes address for notice purposes without notice to Landlord. Rather, Landlord shall be deemed to have fulfilled its obligations with respect to notice to any Qualifying Leasehold Mortgagee, whether or not such Qualifying Leasehold Mortgagee actually received notice, if as set forth in Section 23(d), Landlord gives notices to such Qualifying Leasehold Mortgagee at the address from time to time specified by notice to Landlord.

11. Notwithstanding the provisions of Section 23.3(g), (i) if a Qualifying Leasehold Mortgagee exercises the right to "elect to demand" a new lease properly and in timely fashion under Section 23.3(h), such new lease shall be deemed thereupon effective with the same priority in the Property and with the same effect as the Tenant enjoys under the Lease without any further act of the parties, and the agreement of the parties to execute a new lease shall be considered to be an obligation to confirm the automatic effectiveness of such new lease, and (ii) a Qualifying Leasehold Mortgagee or its nominee as tenant under any such new lease under Section 23.3(h) shall have only such obligations, both as a condition to its right to such new lease and as a provision of such new lease, to cure or perform obligations of Tenant as are capable of being performed by such Qualifying Leasehold Mortgagee or other new tenant.

12. The limited liability provisions of Section 26.1 (second paragraph) apply to any and all liability of Tenant under the Lease, including the provisions for indemnity contained in Section 5.5 and liability of Tenant under Section 5.5 and any liability of a successor Tenant under the Lease after an assumption pursuant to Section 19.2(c).

13. In addition to the provisions of Section 29.1, Landlord agrees that the Lease shall continue in effect notwithstanding any coincidence of title and/or interest between tenant and Landlord or any successor owner of the fee title in the Leased Premises or the Property, such that no doctrine or principle of merger shall have the effect of extinguishing the Lease or affecting any Leasehold Mortgage without the written consent of the Leasehold Mortgagee, which consent such Leasehold Mortgagee may withhold in its sole election.

14. Notwithstanding the provisions of Section 31.14, Aetna shall be the Depository for so long as Aetna is the holder of the Aetna Mortgage or any other interest in the Leasehold Estate of Tenant under the Lease.

15. Landlord confirms to Aetna that the Lease, any new lease pursuant to the provisions of Section 23.3(h), any sublease thereunder, and any Leasehold Mortgages are and shall continue to be superior to any mortgage of Landlord's fee title.

16. Landlord consents to Citicorp's continuing to hold its present Leasehold Mortgage as a second Leasehold Mortgage, junior to Aetna's Mortgage, and acknowledges that Citicorp, as the holder of such second Leasehold Mortgage, shall continue to enjoy the status of a Qualified Leasehold Mortgagee.

This Agreement shall be binding upon Landlord and its successors and assigns as Landlord under the Lease, and inure to the benefit of Aetna and its successors and assigns, including any assignees of the Aetna Mortgage and any purchasers at a foreclosure sale or transferees in lieu of a foreclosure sale under the Aetna Mortgage. To the extent anything in this Agreement is inconsistent with or in addition to existing provisions of the Lease, this Agreement shall govern.

IN WITNESS WHEREOF, the Boston Redevelopment Authority has caused these presents to be executed and delivered in its name and behalf under seal by its officer hereunto duly authorized as of the date first above written.

BOSTON REDEVELOPMENT AUTHORITY

By: _____

Accepted and agreed to:

MARKETPLACE CENTER LIMITED
PARTNERSHIP

By: Marketplace Center, Inc., General Partner

By: _____
James F. Sullivan, President

